

Public Law Case Law Update

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Legal aid – experts’ fees – when the expert exceeds LAA rates, what is the court to do?

Re K and Re S [2025] EWFC100

16 April 2025

Sir Andrew McFarlane, President Of The Family Division

Full judgment can be found [here](#)

Summary

The President of the Family Division provided welcome guidance on what the court and practitioners should do when an approved expert’s rate exceeds the amount that the Legal Aid Agency (‘LAA’) is prepared to sanction. This included: updated guidance from the LAA [23]; general principles put forward by Barnet and endorsed by the experts group [29]; and a template standard order [30].

Background [1 – 12]

On 29.01.25 McFarlane P heard arguments on the issue of expert fees exceeding the rate that the LAA is prepared to sanction in two unrelated cases brought by the London Borough of Barnet (‘Barnet’). McFarlane P briefly describes the facts relevant to each case at [4] – [12].

Barnet argued that: “the court should not simply turn to the local authority as a matter of routine and expect it to cover the shortfall, without at least first undertaking a thorough exploration of any reasonable alternative courses of action” [2].

Prior to the hearing McFarlane P received a letter signed by 88 different local authorities raising the point and invited Mr Justice Williams to convene a sub-group (the ‘experts group’) to look at the issue.

Amended Legal Aid Agency Guidance

At paragraphs 13 – 17, McFarlane P sets out the relevant Regulations and case law relating to the Statutory Legal Aid Scheme. The position of the LAA was summarised at paragraphs 19 -22.

The LAA amended guidance was summarised at paragraphs 23 -25 (**emphasis added**):

*23. The LAA has now amended its ‘Guidance on the Remuneration of Expert Witnesses in Family Cases’ **so that it makes clear that it is not the intention of the LAA that local authorities should make up a shortfall in expert fees** (other than in unusual circumstances) [para 2.4]:*

...

*24. The revised guidance, which was issued in April 2025, **also makes clear what criteria (exceptional circumstances) are to be met** for the LAA to grant prior authority to instruct an*

expert where the fees or hours exceed those set out in the Remuneration Regulations or Guidance [para 2.2 and 2.3]:

...

25. A checklist is included to ensure all relevant information is submitted to the LAA [para 3.26 and Annex 6]. Finally, the guidance explains that, **whilst there is no formal appeal following a decision on prior authority, the LAA operates a system whereby they can be asked informally to review the decision** [paras 3.22 and 3.27].

Positions of the other Parties

The LAA had accepted that, save in unusual circumstances, it should be legal aid covering any shortfall and not the LA. The respective parents and children were, therefore, in their submissions, concerned with the effect of any delay to the substantive proceedings that would be caused by any review of a decision by the LAA not to fund (or not to fund fully) an expert's fees [26 – 27].

The court questioned the assumption that any review or challenge to a LAA decision would mean progress in the care proceedings must necessarily be put on hold. The court stated that the LAA had said decisions would be reviewed in a matter of days once the paperwork was submitted, and in any event, the court could provide for a shortfall to be covered by in the interim by the LA pending review of, or challenge to, the LAA decision [28].

General Principles

Barnett sought the courts endorsement of a set of 'general principles' at the final hearing. These were submitted to, and endorsed by, the experts' group. They are in the following terms [29]:

'i. Those seeking to instruct an expert should make all efforts to identify an expert with the requisite experience and expertise who works within the prescribed rates and the prescribed number of hours and can report within an acceptable timeframe.

ii. If such an expert can be identified then that expert should be preferred by the court absent any exceptional reason.

iii. A local authority should not routinely be considered as a source of funds to make good any shortfall in the instruction of an expert.

iv. A local authority should only be ordered to pay for the shortfall of an expert where the court is satisfied:

a. That there has been proper exploration of other experts who may be able to complete the work within the prescribed rates and for the prescribed

number of hours.

b. That the application for prior authority that has been considered by the Legal Aid Agency has been argued fully and included all material relevant to the decision making of the Legal Aid Agency.

c. That the parties (including the Local Authority) have given proper consideration to the possibility of a claim for judicial review against the Legal Aid Agency.

d. That the reason given by the Legal Aid Agency for refusing to approve the application for prior authority was full and enabled the court and the parties to understand the reason for refusal.'

Template Standard Order [30]

A template standard order was suggested by the expert's group and approved by the LAA which should now be used by the courts:

'The following directions shall apply to the instruction of [name of expert]:

- a. The lead for the instruction of the expert shall be [name].*
- b. The letter of instruction to the expert [as approved by the court today] /[to be agreed by the parties by 4.00pm on [date] and filed at court] must be sent the expert by 4.00pm on [date].*
- c. The issues in the proceedings to which the expert evidence relates are:*
 - (i) [insert]*
 - (ii)*
- d. The Court is of the view that the facts of the case are exceptional, as defined in paragraph 2(2) of Schedule 5 of the Regulations, and the experts instructed are essential to enable a fair and just conclusion of the proceedings because:*
 - (i) [insert Judge's reasons].*
 - (ii) Complexity of material justifies appointment of a senior expert.*
 - (iii) Material of specialised and unusual nature.*
 - (iv) Confirmation of number of experts approached and reasons why that expert should be appointed.*
- e. The questions to be dealt with by the expert are [as set out in the draft letter of instruction] / [as follows: [insert]].*
- f. Permission is [not] given for the expert to see and assess the child[ren]*

- g. Permission is [not] given to call [name] to give oral evidence at the [final]/ [finding of fact] hearing].'*

Conclusion

It is now clear that it should be the exception, not the rule, that the LA are expected to make up the shortfall in public-law children cases.



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